Supreme Court, U.S.
FILED
NOV 27 2000
CLERK

(15)

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF THE FLORIDA SENATE AND HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

ROGER J. MAGNUSON
DORSEY & WHITNEY LLP
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402-1498
(612) 340-2738

Attorneys for Amicus Curiae the Florida Senate

CHARLES FRIED
Counsel of Record
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636

EINER ELHAUGE
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-0860

Attorneys for Amicus Curiae Florida House of Representatives

163726

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

24 pp

QUESTIONS PRESENTED

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State in such Manner as the Legislature thereof may direct.

3. What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Cited Authorities	iii
Interest of the *Amici Curiae*	1
Summary of Argument	1
Argument	3
1. The State Legislature Has Plenary Authority To Appoint Electors And, When An Election Fails To Make A Timely Choice Pursuant To Pre-Existing Rules, It Must Exercise That Authority To Assure Its Electors Are Counted By Congress.	3
2. The Question Whether A State Election Of Presidential Electors Has Failed To Make A Timely Choice That Conforms To Pre-Existing Rules Is A Matter To Be Decided By The Political Branches Rather Than By The Courts.	5
3. If This Is A Matter Justiciable By The Courts, It Is A Matter of Federal Law To Be Determined Ultimately By This Court.	11
4. The Consequences Of A Decision By This Court That The Florida Electoral Process Has Not Conformed To Pre-Existing Law.	16
Conclusion	18

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Baker v. Carr, 369 U.S. 186 (1962)	10
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	13
Coleman v. Miller, 307 U.S. 433 (1939)	9
Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813)	12
Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992)	13
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	16
McPherson v. Blacker, 146 U.S. 1 (1892)	3, 6, 7, 10
Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998)	13
Constitutions:	
FLA. CONSTITUTION ART. III, § 2	1
FLA. CONSTITUTION ART. III, § 3a	1
U.S. CONST. Amend. V	13

Cited Authorities

	Page
U.S. CONST. Amend. XII	2, 3, 10
U.S. CONST. Amend. XIV, § 1	13
U.S. CONST. Art. I, § 10	13
U.S. CONST. Art. II, § 1	5, 17
U.S. CONST. Art. II, § 1, cl. 2	i
U.S. CONST. Art. II, § 1, ¶ 2	2, 3, 4, 11
U.S. CONST. Art. V	9
Statutes:	
3 U.S.C. § 2	2, 4, 6, 7, 14, 16, 17
3 U.S.C. § 5	*passim*
3 U.S.C. § 15	2, 8, 10, 17
FLA. STAT. § 97.012	15
FLA. STAT. §§ 102.111-112	14
FLA. STAT. § 106.23(2)	14
Rule:	
United States Supreme Court Rule 37.6	1

Cited Authorities

	Page
Other Authorities:	
18 CONG. REC. 30 (1886)	8
18 CONG. REC. 47 (1886)	6, 8, 12
Electoral Count Act of 1887, Ch. 90, 24 Stat. 373	6, 7
KURLAND & LERNER, FOUNDER'S CONSTITUTION 553	6
Senate Rep. No. 395, 1st Sess. 43d Cong. (1874)	3, 6, 7

INTEREST OF THE *AMICI CURIAE*[1]

The Constitution and laws of the United States assign preeminent responsibilities to the State Legislatures in the process of appointing Presidential Electors. As we explain in this brief, the disposition of this case, especially in light of the additional question raised by the Court, will almost certainly have a substantial impact on how the Florida Legislature[2] will carry out those responsibilities in the present most unusual circumstances. Indeed, the Florida Legislature's interest is so great that it would have sought to intervene in the litigation below but for the circumstances that, until 14 days after the election, or November 21, 2000, the Florida Legislature was not lawfully organized and the constitutional offices of Speaker of the House, President of the Senate, and Clerk of the respective chambers were thus vacant. FLA. CONSTITUTION ART. III, § 2, § 3a.

SUMMARY OF ARGUMENT

The Constitution grants plenary authority to the State Legislatures to appoint their Presidential Electors in any manner they direct. 3 U.S.C. § 5 provides that, if a State's electoral process is timely and conforms to pre-existing rules,

---

1. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The Florida Legislature has secured the consent of all parties to the filing of a brief as *amicus curiae* and those consents are being lodged with the Clerk of the Court.

2. We will use the term "Florida Legislature" to refer to both the Florida Senate and the Florida House of Representatives.

Congress will regard the results of that process as conclusive of which Electors were appointed in the manner directed by the State Legislature. When the electoral process has failed to make a choice that is timely and conforms to pre-existing rules, then under 3 U.S.C. § 2 the State Legislature must appoint Electors to assure that the State's Electors are counted by Congress when exercising its counting authority. The Legislature itself, and not the courts, is the arbiter of when a failure to make such a choice has occurred.

In view of the constitutional and statutory schema, this Court should rule that the question whether the state electoral process deviated from pre-existing law under 3 U.S.C. § 5 is not justiciable but is instead a political matter to be decided in the first instance by the State Legislature under U.S. CONST. Art. II, § 1, ¶ 2 and 3 U.S.C. § 2, then by Congress when exercising its counting authority under U.S. CONST. Amend. XII and 3 U.S.C. § 15.

If the Court finds that the issue is justiciable, it should rule that whether the state electoral process has conformed to pre-existing rules is a federal question under U.S. CONST. ART. II, § 1, ¶ 2 and 3 U.S.C. § 5, to be resolved ultimately by this Court and not by the highest state court.

If the Court also concludes that the electoral process at issue deviated from pre-existing law, and therefore did not comply with 3 U.S.C. § 5, then it should order the Florida courts to correct those deviations before December 12 in order to assure that Florida's Presidential Electors will be determined by the choice of the voters under those pre-existing rules. If those deviations cannot be corrected by December 12, then it will be necessary for the Florida Legislature to exercise its authority to appoint Electors to assure Florida is represented in the Electoral College.

ARGUMENT

1. The State Legislature Has Plenary Authority To Appoint Electors And, When An Election Fails To Make A Timely Choice Pursuant To Pre-Existing Rules, It Must Exercise That Authority To Assure Its Electors Are Counted By Congress.

The Constitution of the United States grants each State Legislature the plenary power to appoint that State's Presidential Electors. *See* U.S. CONST. ART. II, § 1, ¶ 2 ("each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors."). This clause confers "plenary power to the state legislatures in the matter of the appointment of electors." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). " 'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states.' " *Id.* at 34 (quoting favorably Senate Rep. No. 395, 1st Sess. 43d Cong. (1874)).

The Constitution places upon Congress the duty to count the votes of the Electors whom the states have appointed. U.S. CONST. Amend. XII. Implicit in this duty is the authority to resolve disputes about whether the Electors have in fact been appointed in the manner directed by the State Legislature. Congress has enacted statutes to regulate its counting of electoral votes. These statutes have been codified in Title III of the United States Code.

Where, as in Florida, the Legislature has chosen to use an election to determine which Electors to appoint, 3 U.S.C. § 5 provides that the results of that election shall be deemed conclusive by Congress when it counts electoral votes, provided controversies regarding that election are resolved

in a manner that is both timely (here before December 12, 2000) and in conformance with rules and procedures adopted prior to the election. Timeliness is crucial because of, among other things, the importance of having a President and allowing preparations for an orderly transition. Even more crucial is the principle embodied in Section 5 that the rules of the election must be set before the election and cannot be changed after it becomes clear who would benefit from such a change. Otherwise the law would encourage post-election manipulations of election law to alter the outcome of a Presidential race.

If a State's election "has failed to make a choice" that is timely and conforms with pre-existing law, then 3 U.S.C. § 2 recognizes that appointment of Electors by the State Legislature is proper. In such a case, state legislative appointment would be necessary to assure the State will have Presidential Electors that will be counted by Congress under Title III. Indeed, the Florida Legislature would have an affirmative constitutional duty to appoint Presidential Electors before December 18 to assure Florida is represented in the Electoral College, because the Constitution dictates that each State "shall" appoint the requisite number of Presidential Electors "in such Manner as the Legislature thereof may direct." U.S. CONST. Art. II, § 1, ¶ 2. Where purported Electors have been chosen by an election process that was not conducted in the manner that the State Legislature had directed, then it becomes necessary for the State Legislature to exercise that appointment authority directly.

2. The Question Whether A State Election Of Presidential Electors Has Failed To Make A Timely Choice That Conforms To Pre-Existing Rules Is A Matter To Be Decided By The Political Branches Rather Than By The Courts.

Although no single provision explicitly addresses which entity is responsible for deciding whether an election failed to make a choice that is timely and in conformance with pre-existing law under 3 U.S.C. § 5, a careful reading of the Constitution and the United States Code dictates the answer: the responsibility falls first to the State Legislature and, if it has not exercised that prerogative, then to Congress.

Article II, Section 1, of the United States Constitution expressly grants each State Legislature the authority to assure that its Electors are chosen in the manner it has directed. This constitutional power is conferred directly on the State Legislature, not on the State as a whole, and cannot be limited by state courts or even by a state constitution:

> "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. . . . This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated."

McPherson, 146 U.S. at 34-35 (favorably quoting 1874 Senate Report, *supra*).

Because of the constitutional nature of a State Legislature's appointment authority, Title III of the United States Code cannot be understood as a limitation on the State Legislature's authority to appoint Presidential Electors. *See* 18 CONG. REC. 47 (1886) (statement of Rep. Dibble). Congress has no power to limit the exercise of a constitutional power granted directly to the State Legislatures. As Charles Pinckney stated:

> Nothing was more clear . . . than that Congress had no right to meddle with [the electoral college] at all; as the whole was entrusted to the State Legislatures, they must make provisions for all questions arising on the occasion.

KURLAND & LERNER, FOUNDER'S CONSTITUTION 553. Instead, Title III merely regulates how Congress will exercise its own constitutional authority to count the electoral votes it receives.

Indeed, even if it were constitutionally permissible for Congress to limit the appointment authority of State Legislatures, there is no reason to think Title III was ever intended to do so. Sections 2 and 5 of Title III were enacted as part of the Electoral Count Act of 1887, Ch. 90, 24 Stat. 373, the very title of which emphasizes that it merely regulates Congress's own authority to "count" electoral votes in cases where it is disputed whether the Electors were appointed in the manner directed by the State Legislature. Likewise, it is plain this Court did not understand Sections 2 and 5 to have limited the appointment power of State

Legislatures, since the *McPherson* opinion in 1892 re-emphasized the plenary nature of that appointment authority five years after the Electoral Count Act was enacted. Being enacted in a period between this 1892 opinion and the 1874 Senate Report quoted above, the Electoral Count Act of 1887 surely reflected the contemporaneous constitutional understanding that State Legislatures had exclusive authority over their appointment power, and did not mean to abrogate it.

Where a State Legislature has directly appointed its Electors because there was no election or it was determined that (for reasons of timeliness or deviation from pre-existing rules) the election failed to make a choice, there can be no legitimate dispute in Congress whether the directly appointed Electors were appointed in the manner directed by the State Legislature and thus should be counted. The direct appointment removes any ambiguity about the exercise of the State Legislature's appointment authority. Thus, 3 U.S.C. § 2 provides that Congress will recognize those direct appointments when Congress exercises its own counting power. Congress has a constitutional obligation to count the votes of any qualified Elector who was indisputably appointed by the State Legislature.

Section 5 of Title III is meant to address the more complicated case where the State Legislature has not directly appointed its Electors but has instead directed that those Electors be chosen in an election conducted according to certain rules. Where the election process is conducted according to those pre-existing rules, then under Section 5 its results are conclusive on Congress when it counts the electoral votes. But Title III recognizes that controversies might arise about whether an election was in fact conducted

according to pre-existing rules, raising questions about the validity of one or more slates of Electors. This would create an ambiguity about whether (or which of) the purported Electors were constitutionally appointed in a manner directed by the State Legislature. To resolve such controversies, Section 15 of Title III provides that it will then be up to Congress to determine whether the votes of the Electors before them have been "regularly given" in compliance with the timeliness and pre-existing rules provisions of 3 U.S.C. § 5. *See* 18 CONG. REC. 30 (1886) (statement of Rep. Caldwell); *id.* at 47 (statement of Rep. Cooper). Section 15 goes on to set out elaborate rules for how the House and Senate will resolve objections that the votes of particular Electors were not "regularly given." In essence, such objections are resolved by the concurrent agreement of the House and Senate, and where they disagree the Electors who will be counted are those who were certified to Congress as the correct Electors by the State Governor. 3 U.S.C. § 15. These elaborate rules would not have been necessary if Congress had envisioned the courts would decide the issue of which Electors' votes were "regularly given."

The Florida Legislature respectfully submits that the Court should rule that questions regarding whether the electoral process has conformed with pre-existing law are not issues for this Court. Such questions should be determined by the State Legislature or, if it fails to act by December 18 when the Electors cast their votes, by Congress when it counts those electoral votes on January 6, 2000. Such a ruling that these are non-justiciable questions to be resolved by the political branches would recognize that the Constitution vests the State Legislatures with the power to appoint Electors, and Congress with the power to count their votes. It also makes the most sense of the United States Code

governing how Congress exercises its counting powers. The alternative would put this Court in the uncomfortable position of seeking to enjoin how Congress exercises its constitutional counting authority and how the State Legislatures exercise their constitutional appointment authority.

The situation is analogous to that under Article V, which requires that amendments to the Constitution be ratified either by conventions or by three-fourths of the State Legislatures. This requires determinations of the equally political (but even more fundamental) question whether each State Legislature has duly ratified, pursuant to Article 5, a proposed amendment to the Constitution. Even without any express constitutional provision empowering Congress to count ratifications by State Legislatures, this Court has ruled that

> the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

Coleman v. Miller, 307 U.S. 433, 450 (1939). Indeed, four concurring Justices stated that "Congress has sole and complete control over the amending process, subject to no judicial review." *Id.* at 459 (Black, J., joined by Roberts, Frankfurter & Douglas, JJ., concurring).

A ruling of non-justiciability would avoid involving this Court in a political dispute best resolved by the political

process.[3] It is neither surprising nor inappropriate that the law should lodge that authority in the State Legislatures and Congress. What is at stake here is after all a political determination of who shall be the next President. The issue to be determined is uniquely political. Nor is it likely to recur. Thus, in this rare circumstance, it is entirely appropriate to have it resolved by the branches of government that are most responsive to the will of the people. "The constitution . . . recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object." *McPherson*, 146 U.S. at 27. In any event, whether desirable or not, that is the constitutional scheme. *Id.* at 35 ("The question before us is not one of policy, but of power.")

In short, the Florida Legislature submits that the issue of whether its state electoral process has complied with pre-existing law and the directions of the State Legislature is a non-justiciable issue best resolved by the State Legislature responsible for giving those directions. It may be that Congress in exercising its counting authority under U.S. CONST. Amend. XII or 3 U.S.C. § 15 may make its own determination of this question. In either event, such

---

3. That the questions the parties ask this Court to answer are political in nature is a conclusion that accords with several of the criteria set out in *Baker v. Carr*, 369 U.S. 186, 271 (1962). There is indeed a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* Moreover, a decision that would in effect decide the outcome of a Presidential election is "of a kind clearly for nonjudicial discretion." *Id.* Also the Court's intervention may be taken to imply "lack of respect due coordinate branches of government." *Id.* And finally there is indeed the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

determinations should not be reviewable in any court. If this Court rejects that contention, then it must determine for itself whether the state electoral process has complied with the provisions of 3 U.S.C. § 5 and the State Legislature's directions under U.S. CONST. ART. II, § 1, ¶ 2. But, as demonstrated in the next section, the one entity that cannot be allowed to have sole unreviewable authority on this issue is the Supreme Court of Florida.

3. If This Is A Matter Justiciable By The Courts, It Is A Matter of Federal Law To Be Determined Ultimately By This Court.

If this Court rules that the issue is justiciable, then the Supreme Court of Florida cannot have the last word on what is, after all, a question of federal law. 3 U.S.C. § 5 provides an express federal statutory requirement to have elections for Presidential Electors determined by pre-existing state election law. The question whether that federal requirement has been violated by a change in state law, if justiciable at all, is justiciable as a federal question. Likewise, U.S. CONST. ART. II, § 1, ¶ 2 requires that Electors be appointed in conformance with the directions of the State Legislature. The issue of whether that constitutional requirement has been met, if justiciable, clearly presents a question of federal constitutional law.

Section 5 of Title III lays down a federal standard for judging whether there has been such a failure to choose Electors: the appointment of Electors set out in state law "shall be conclusive, and shall govern in the counting of the electoral votes" but only if the State has "provided, by laws enacted *prior* to the day fixed for the appointment of electors, for its final determination of any controversy or contest

concerning the appointment of all or any of the electors . . . by judicial or *other* methods or procedures . . . ." 3 U.S.C. § 5 (emphasis added).

Florida has in place an election code for the resolution of disputes and a court system, including a supreme court, with the usual judicial powers of such courts. This does not mean, however, that therefore whatever conclusion emanates from the Supreme Court of Florida must be taken as correct and final by this Court, the Florida Legislature and the Congress. Such a reading of Section 5 would fail to offer assurance, which it is surely the intent of the Section to provide, *see* 18 CONG. REC. 47 (1886) (statement of Rep. Cooper), that the rules and directions of the State Legislature have not been altered after the election to suit a particular outcome. Even if the section grants only procedural justice, what is in question here is precisely a change of election procedure. Pre-existing law did not provide that the election procedure would be whatever the Supreme Court of Florida decided it would be after the election. Rather, the pre-existing law provided that detailed statutory procedures were to be followed and that some issues were to be resolved by the Secretary of State (one of the "other methods or procedures" recognized under § 5) rather than the courts. The Florida courts cannot be the final arbiter of whether they themselves have changed the methods and procedures directed by the Florida Legislature. *See, e.g., Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (review in the United States Supreme Court will lie to determine whether a state court has misinterpreted state law to defeat a federal right).

Federal constitutional law is replete with instances in which a matter rests upon a determination of state law provided that the final state interpretation or application of

that law does not depart from previously established state law. The rules of property law, for example, are exclusively the creation of state law, but in enforcing the Fifth Amendment's proscription against taking property without just compensation, the federal courts review whether state law changed from what had previously been state law. *See Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1029 (1992) (property limitations that are "newly . . . decreed" by state courts can be takings if they do not reflect "restrictions that background principles of the State's law of property and nuisance *already place* upon land ownership" (emphasis added)); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (whether interest is the property of the owner of the principal depends on what the state law was prior to the regulation). Such an inquiry into the pre-existing condition of state law is also carried out to determine whether there has been a deprivation of "life, liberty or property, without due process of law." U.S. CONST. Amend. XIV, § 1. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Similarly, the Constitution's *ex post facto* clause, U.S. CONST. Art. I, § 10, would be deprived of meaning if inquiry into whether a State has changed its previous law were foreclosed.

In sum, where federal law requires that a rule of law, including a rule of state law, be previously established or enacted, as does 3 U.S.C. § 5, it is a federal question whether the development of law by the courts, including state courts, constitutes an impermissible departure from such previous law. In this case, it appears that there may have been at least three sorts of departures from pre-existing law such as may deprive the choice of Electors of the conclusivity otherwise accorded to the state electoral process by Section 5.

First, the Supreme Court of Florida, by extending the mandatory statutory seven-day deadline for reporting county results to the statewide commission, delayed certification of the vote count after the election, and significantly shortened the time in which contests regarding the vote as certified might be brought and adjudicated. By compressing that time, the court increased the likelihood that such contests would not be finally adjudicated by the date that a final choice of Electors by an election must be made (here, December 12, 2000) and therefore that the Legislature, under Section 2, would have the power and duty to appoint Electors. That compression and the seriousness of its consequences may constitute an important obstacle and deterrent to the full and fair adjudication of such contests. It also appears dramatically to change the existing law by which the Florida Legislature sought to appoint Electors.

Second, the court below shifted responsibility to make any decisions about deadline waivers and interpretations of the election code to itself and away from the statute and the elected official, the Secretary of State, whom the Florida Legislature vested with the authority to make such decisions. The Supreme Court of Florida in essence re-wrote a statutory provision stating that voting returns "shall" be filed in time to say they "may" be filed in time, re-wrote a provision stating that the Secretary "may" count late returns to provide instead that she "must," re-wrote a seven-day reporting deadline provided by the legislature to a nineteen-day deadline, and re-wrote a statute that said the Secretary of State's opinions "shall be" binding on county officials to say they shall not.[4]

---

4. *See* FLA. STAT. §§ 102.111-112 (setting forth the deadlines); FLA. STAT. § 106.23(2) ("The Division of Elections shall provide (Cont'd)

These post-election interpretations of the election laws do not appear to conform to pre-existing law.

Third, it appears that several of the county canvassing boards may have failed to adhere to the rules and standards for whether and how to do manual recounts that they had adopted in previous elections, *i.e.*, rules and standards in force "prior to [this election]," or in fact changed those rules and standards after they had begun counting the ballots in this election. Such departures by county canvassing boards would appear to violate 3 U.S.C. § 5, to deprive the choice made by ballot on election day of conclusivity and to require the Florida Legislature to appoint Electors. Nor does it appear that any such departures merely constituted the application to these circumstances of previously established legal principles — such as the primacy of the will of the people or the importance of determining ballot-by-ballot the intent of the voter. Such principles, invoked by the court below, are of such a high level of generality that they do not constrain at all and certainly do not offer the assurance required by section 5 that the State not change the rules after the election has been held to suit the political circumstances. The fact is that there are many possible tests for judging the intent of the voter, and having chosen certain tests before the election as those best calculated to determine that intent, it would appear that the county canvassing boards cannot change the tests in midstream.

(Cont'd)
advisory opinions when requested . . . . The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought"); FLA. STAT. § 97.012 ("The Secretary of State is the chief election officer of the state, and it is his or her responsibility to: (1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.")

Each of these departures from existing law may mandate a finding that Florida's election process has violated Section 5. If so, unless corrected — by the Florida Legislature or as ordered by this Court — those violations may jeopardize Florida's participation in the Electoral College.

4. The Consequences Of A Decision By This Court That The Florida Electoral Process Has Not Conformed To Pre-Existing Law.

If this Court finds a violation of 3 U.S.C. § 5, then it can order the Florida courts to correct the deviations from pre-existing law. Assuming these deviations are corrected by December 12, then the electoral process will have produced a result that conforms with 3 U.S.C. § 5, and there would be no occasion for state legislative action.

Alternatively, the Court might conclude there was a violation of 3 U.S.C. § 5, but the violation cannot be corrected by December 12. This might be the case, for example, if the Court concludes that any manual recounts must be conducted under the pre-existing standard and there is not enough time to re-do the manual recounts under that standard. In that case, the Florida Legislature would be obliged to appoint Electors under 3 U.S.C. § 2 by December 18.

More complicated is the answer to the negative pregnant: what would be the consequences if this Court does *not* find that the Supreme Court of Florida violated 3 U.S.C. § 5? Of course, if this Court should make such a ruling, the Florida Legislature, like other organs of government, state or national, would be bound to honor that determination. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). But the

precise consequences would depend on the reasons given by the Court for its decision.

If the Court does not make the finding because it concludes that the issue is not justiciable, then the Florida Legislature would itself be required to decide whether the election results comported with pre-existing law, and if the Florida Legislature does not make such a decision by December 18, Congress would be obliged to decide the issue on January 6.

Alternatively, if the Court limits its ruling, as Question 3 suggests, to whether the Supreme Court of Florida has deviated from pre-existing rules, it would remain incumbent upon the Florida Legislature and Congress to decide whether the apparent deviations from prior standards by the county canvassing boards were sufficient to justify legislative appointment of Electors under 3 U.S.C. §§ 2, 5 and 15, and U.S. CONST. Art. II, § 1.

Finally, the Court might determine that departures from pre-existing methods and procedures by the Supreme Court of Florida are not sufficiently egregious to warrant correction by this Court. In that event, we would ask the Court also to rule that the Florida Legislature and Congress need not apply the same deferential standard and would thus not be bound by this determination in deciding whether, under the separate powers assigned to them by the Constitution, to appoint or count Electors.

CONCLUSION

The Court should rule that Questions 1 and 2 are not justiciable because their resolution lies in the hands of the Florida Legislature or, if it does not act, the Congress. If this Court nonetheless reaches those questions and concludes that the election decisions below deviated from pre-existing law, then the Court should order those deviations to be corrected before December 12, in which case the Electors will be determined by the choice of the voters under those pre-existing rules. If those deviations cannot be corrected by December 12, then it will become necessary for the Florida Legislature to exercise its authority to appoint Electors to comply with its constitutional duty to assure Florida is represented in the Electoral College.

Respectfully submitted,

ROGER J. MAGNUSON
DORSEY & WHITNEY LLP
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402-1498
(612) 340-2738

Attorneys for Amicus Curiae the Florida Senate

CHARLES FRIED
Counsel of Record
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636

EINER ELHAUGE
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-0860

Attorneys for Amicus Curiae Florida House of Representatives